United Nations A/HRC/WGAD/2018/36

General Assembly

Distr.: General
5 June 2018

Original: English

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 36/2018 concerning Ngô Hào (Viet Nam)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 1 February 2018, the Working Group transmitted to the Government of Viet Nam a communication concerning Ngô Hào. The Government replied to the communication on 24 April 2018. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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Submissions

Communication from the source

4. Mr. Hào is a 69-year-old Vietnamese citizen who resides in Tuy Hòa City, Phú Yên Province, Viet Nam. According to the source, Mr. Hào is a blogger and human rights defender who has sought to exercise his rights to freedom of expression and association through a range of activities.

5. The source reports that Mr. Hào served in the South Vietnamese Army before the reunification of Viet Nam in 1975. He was placed in a "re-education camp" due to his support for the South (backed by the United States of America) during the Viet Nam War, and subsequently as punishment for his role in establishing the Lien Minh Viet Nam Party (Viet Nam Alliance Party).

6. Since 2008, Mr. Hào has been a campaigner on a range of matters of public interest within Viet Nam. He has used the Yahoo Groups online blogging platform to publish and disseminate articles in which he has criticized the Government. Many of his articles relate to human rights issues such as land confiscation and harassment of religious leaders. On 9 February 2012, Mr. Hào posted a blog post on Yahoo Groups discussing the suffering of citizens due to the activities of the ruling Communist Party. Mr. Hào has advocated for the rights of land reform victims by petitioning the President of Viet Nam. He has also engaged in advocacy on behalf of imprisoned members of the Hòa Hao Buddhist movement, and the 22 imprisoned members of the Bia Son environmental group.

7. The source claims that Mr. Hào was arrested and detained against a background of restrictions on the freedoms of expression and association, and the right to participate in political affairs. In addition to media and Internet laws, provisions of the Criminal Code of Viet Nam have been key to the suppression of freedom of expression, and are routinely employed to imprison human rights defenders and bloggers. Several of these laws have been criticized for violating the obligations of Viet Nam under international human rights law with respect to freedom of expression, but no steps have been taken to repeal them. In addition, Viet Nam has faced widespread criticism for its failure to uphold due process and basic fair trial guarantees.

Arrest and detention of Mr. Hào

8. The source alleges that, since 2008, Mr. Hào has received regular cautions from the police warning him against his activities, which were deemed to be contrary to the interests of the State. On 20 December 2012, his home was searched by the police and inspectors of the Department of Information and Communication. This search was carried out within three days of his posting a blog post that was particularly critical of the Communist regime. It appears that no warrant was provided prior to this search, which lasted only 15 minutes.

9. The search record documents the removal of materials from Mr. Hào's home and computer that purportedly demonstrate that Mr. Hào was using the Internet to spread distorted information that infringed upon the interests of organizations and citizens. This information included telephone numbers in the United States, contact details for Radio Free Asia, a SIM card and micro Secure Digital memory stick, communications with a member of Bloc 8406 and Veto! Human Rights Defenders' Network, a document calling on international human rights bodies and individuals to advocate for the release of an imprisoned activist, and a document relating to a radio programme that alleged corruption by a senior officer of the Phú Yên police. The items removed from Mr. Hào's computer also included a document containing an image of the flag of the former Republic of Viet Nam, which was allegedly planted by the authorities during the search. The police claimed that Mr. Hào's old military coats were evidence of his attempts to overthrow the Communist regime.

10. On 8 February 2013, Mr. Hào was asked to come to a police station in Tuy Hòa City for questioning. His son arrived at the station an hour later and was informed of his father's arrest. According to the source, no arrest warrant was produced at that time. Mr. Hào was charged under article 79 of the Criminal Code with taking actions "aimed at overthrowing the people's administration". Mr. Hào was held in a detention centre in Tuy Hòa City for 12

months. During a pretrial visit, Mr. Hào told a family member that he had been tortured by the police to extract a confession. The confession was allegedly obtained through removing his clothes and continuously pouring cold water onto his body.

Trial proceedings and appeal hearing

11. According to the source, Mr. Hào's trial was held seven months after his arrest, on 11 September 2013, before the People's Court of Phú Yên Province. His family was notified of the trial date only a week in advance, and was unable to appoint a lawyer. A State defence lawyer was appointed to act for Mr. Hào, but he opted to represent himself because he was prevented from appointing a lawyer of his choice. The source alleges that only Mr. Hào's family was permitted entry into the courthouse, which was occupied and surrounded by police to prevent public attendance. Mr. Hào was escorted into the courtroom by 30 uniformed police officers, and was prevented from addressing the court throughout the hearing. He was only permitted to give yes/no responses to questions and could not cross-examine or call witnesses in his defence.

12. On the same day, Mr. Hào was convicted of taking actions "aimed at overthrowing the people's administration" under article 79 of the Criminal Code, and was sentenced to 15 years' imprisonment, with a further 5 years of house arrest. He was found guilty of archiving, writing, disseminating and sharing articles that contained distorted information about Viet Nam and that were defamatory of some of the country's leaders. In addition, he was found guilty of calling upon individuals to intervene against the State, and to campaign for human rights and democratic reforms. He was convicted of being involved with several pro-democracy and civil society groups and organizations, including Bloc 8406, an online coalition of political groups and individuals seeking democratic reform in Viet Nam. Mr. Hào's communications seeking to be registered as an official member of Bloc 8406 were cited as evidence against him in the judgment of the People's Court. The judgment openly recognized that Mr. Hào's offending activities were carried out in a non-violent form.

13. The source alleges that Mr. Hào was initially denied a copy of the trial judgment, which was to be used in order to appeal against his conviction. His family was prohibited from appealing on his behalf on the ground that they were "not related to him". An appeal was eventually lodged on 23 September 2013. The appeal was rejected by the Supreme People's Court on 23 December 2013 on the ground that there was sufficient evidence to find Mr. Hào guilty of involvement in the alleged acts.

14. The source reports that, on 8 February 2014, Mr. Hào was transferred to Xuân Phước Prison, where both his physical and mental health rapidly deteriorated due to a lack of access to proper medical treatment for his stomach ulcer, paralysis and hearing difficulties, and to the effects of forced hard labour. On 9 February 2015, Mr. Hào was transferred to An Diem Prison, located over 300 km from his family home, which has rendered visits difficult. During a visit from a family member on 27 May 2016, Mr. Hào disclosed that he had suffered from a stroke and had been taken to the prison clinic. Mr. Hào's family is concerned about his deteriorating health. Mr. Hào has been in detention for over five years.

Submissions on arbitrary deprivation of liberty

15. The source submits that Mr. Hào's deprivation of liberty is arbitrary according to categories II and III.

16. In relation to category II, the source asserts that Mr. Hào has been deprived of his liberty as the result of exercising his rights to the freedoms of expression and association, and to take part in the conduct of public affairs.

17. The source submits that, given Mr. Hào's activities as a human rights blogger and defender, the real purpose of his detention is to punish him for the peaceful exercise of his rights under article 19 of the Covenant, and to deter others from exercising their right to freedom of expression. The source recalls that the arbitrary arrest and detention of online journalists is widespread in Viet Nam. Mr. Hào's situation is yet another example of arbitrary arrest and detention that resulted from online activism and criticism of the Government. According to the source, the Government relied on Mr. Hào's history of

activism, including the writing and publishing of articles, to secure his conviction under article 79 of the Criminal Code for taking actions "aimed at overthrowing the people's administration". In criticizing the Government, Mr. Hào was exercising his right to freedom of expression, which is to be afforded particularly high protection under article 19 (2) of the Covenant. His arrest, detention, conviction and sentencing constitute a direct restriction on his right to freedom of expression.

18. The source argues that any restriction imposed on freedom of expression must satisfy the requirements of article 19 (3) of the Covenant. Article 79 of the Criminal Code is not formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly. This provision criminalizes any action that may be deemed to be "aimed at overthrowing" the Government, and is, therefore, excessively vague. The source notes that article 79 of the Criminal Code has been directly criticized on this basis by civil society and by the Working Group on Arbitrary Detention. Furthermore, the vague nature of article 79 effectively confers unfettered discretion on those responsible for applying the provision. The source asserts that the first requirement of article 19 (3) of the Covenant, namely that the restriction must be provided by law, has not been satisfied.

19. In addition, the source claims that the arrest, detention and conviction of Mr. Hào were not carried out in the pursuit of any legitimate aim, as required by article 19 (3) of the Covenant, and that the measures adopted are unnecessary and disproportionate. The source recalls that the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has stated that restrictions on political debate and expressions of dissent are not permissible under the Covenant (see A/HRC/14/23, para. 81 (i)). In paragraph 42 of its general comment No. 34 (2011) on the freedoms of opinion and expression, the Human Rights Committee has stated that imposition of penalties on a journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression. The source asserts that it is precisely because of his expressions of dissent that Mr. Hào was arrested, detained and sentenced.

20. Mr. Hào has been sentenced to 15 years' imprisonment, with a further 5 years of house arrest. The source asserts that the imposition of such a severe penalty is disproportionate, given that the Vietnamese courts conceded that Mr. Hào's activities were of a non-violent nature. Moreover, the courts explicitly stated in their judgments that Mr. Hào was penalized for having defamed the leaders of Viet Nam. In paragraph 47 of its general comment No. 34 (2011), the Human Rights Committee states that imprisonment is never an appropriate penalty in defamation cases. Mr. Hào's arrest, detention, conviction and sentence thus fail to satisfy the requirements of article 19 (3) of the Covenant.

21. The source submits that Mr. Hào was arrested, detained and sentenced for his association with civil society and pro-democracy organizations. For example, purported evidence of his connections with peaceful organizations such as Bloc 8406 and the Republic of Viet Nam Government in Exile were key reasons for his conviction. This evidence included a request for Mr. Hào's details in order to register him as an official member of Bloc 8406. According to the source, these facts demonstrate that Mr. Hào's detention was intended to serve as a restriction on his right to freedom of association, and is part of an ongoing pattern of arbitrary detention of associates of opposition groups within Viet Nam. The source presented similar arguments to those outlined above in relation to article 19 (3) of the Covenant, as to why the permissible restrictions on freedom of association found in article 22 of the Covenant do not apply in the present case.

22. The source submits that the authorities have targeted Mr. Hào due to his communication of political opinions on matters of public interest, particularly those that were critical of the Government. Mr. Hào has also been targeted for his association with civil society and pro-democracy organizations, such as Bloc 8406, which advocate for political reform in Viet Nam. By arresting and detaining Mr. Hào, the authorities have violated his right as a citizen to take part in the conduct of public affairs under article 21 of the Universal Declaration of Human Rights and article 25 of the Covenant.

23. In relation to category III, the source points to several instances of the non-observance of Mr. Hào's right to a fair and public hearing, as guaranteed under articles 10

and 11 of the Universal Declaration of Human Rights and article 14 of the Covenant. These include:

(a) The right to a public hearing. The public was denied access to both Mr. Hão's trial and appeal hearings. Only his family was permitted entry, and the courthouse was surrounded by police to prevent public attendance. The exclusion of the public from a hearing is only justifiable when there are concerns about national security, public morals, public order, privacy or where publicity would be prejudicial to the interests of justice. Mr. Hão's case does not fall within any of these exceptions. The information presented during the trial would not have posed any concerns relating to national security, public morals, public order or privacy, nor would publicity have been prejudicial to Mr. Hão. Mr. Hão's right to a public hearing under article 14 (1) of the Covenant was therefore violated;

(b) The right to an independent and impartial tribunal. Throughout the hearing, Mr. Hão was denied the opportunity to address the court or to fully respond to questions. He was also prevented from cross-examining witnesses against him and from calling witnesses in his defence. These restrictions could not have appeared impartial to a reasonable observer and amount to a violation of the right to an impartial hearing under article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant;

(c) The presumption of innocence. The trial judge took only 45 minutes to deliberate before convicting Mr. Hão and sentencing him to 15 years' imprisonment with a further 5 years of house arrest. This suggests that Mr. Hão's guilt had been determined prior to the hearing, and his treatment violates the presumption of innocence guaranteed by article 11 of the Universal Declaration of Human Rights and article 14 (2) of the Covenant;

(d) Procedural guarantees required for a fair trial. Article 14 (3) of the Covenant requires accused persons to be afforded certain procedural guarantees in order to secure the right to a fair trial. These guarantees are also found in article 11 of the Universal Declaration of Human Rights, principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and principle 7 of the Basic Principles on the Role of Lawyers. Mr. Hão's right to be informed of the charges against him has been violated, as no arrest warrant was provided to his family at the time of his arrest. Moreover, his family was notified of the trial date only a week in advance, an extraordinarily short period that prevented Mr. Hão from appointing a lawyer of his own choosing and denied him adequate time to prepare his defence. Adequate facilities include access to all materials that the prosecution plans to offer in court against the accused. Since an arrest warrant was not provided at the time of arrest, Mr. Hão did not possess adequate information to begin preparing his defence;

(e) The right to trial without undue delay. Mr. Hão was arrested on 8 February 2013 and held in prison for seven months until his trial on 11 September 2013, in violation of his right to be tried without undue delay under article 14 (3) (c) of the Covenant;

(f) The right to examine witnesses. Throughout the hearing, Mr. Hão was prevented from cross-examining and summoning witnesses, in violation of article 14 (3) (e) of the Covenant. He was not permitted to address the court and was allowed to give only yes/no responses, which is a further violation of his right to prepare and present his defence under article 14 (3) of the Covenant;

(g) The right not to be compelled to testify against oneself or to confess guilt. Mr. Hão's procedural rights were also violated by confessional evidence used against him that was extracted through ill-treatment by the police. Mr. Hão gave a confession only after the police removed his clothes and continuously poured cold water onto his body. This treatment violates articles 7 and 14 (3) (g) of the Covenant.

24. The source asserts that Mr. Hão's pretrial and ongoing detention violate the Body of Principles, particularly principles 15, 19 and 20. During Mr. Hão's pretrial detention and for the first 17 months of his post-trial detention, his family was only permitted to visit him on a monthly basis, in violation of principle 15. Furthermore, on 9 February 2015, Mr. Hão was transferred to a detention centre 300 km from his home, and this has significantly hindered visitation. Mr. Hão has been denied his right to be visited by his family and to reside near his home, contrary to principle 20 of the Body of Principles.

Communication from special procedure mandate holders

25. Mr. Hào was the subject of a joint urgent appeal addressed to the Government on 17 April 2014 by several special procedure mandate holders.[1] The Working Group acknowledges the Government's reply dated 15 July 2014.[2]

Response from the Government to the regular communication

26. On 1 February 2018, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 3 April 2018 about Mr. Hào's current situation. The Working Group also requested the Government to clarify the legal provisions justifying his continued detention, and its compatibility with the obligations of Viet Nam under international human rights law. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of Mr. Hào.

27. On 29 March 2018, the Government requested a one-month extension of the deadline for response. The Government replied to the regular communication on 24 April 2018.

28. In its response, the Government notes that, during the period 2008–2012, Mr. Hào wrote, amassed and disseminated a number of articles aimed at distorting information, defaming the State and inciting people to overthrow the Government. On 20 December 2012, the authorities carried out a search at Mr. Hào's residence, discovering and confiscating 108 document folders concerning his activities against national security.

29. On the basis of the evidence collected, on 7 February 2013, the police opened criminal proceedings against Mr. Hào, charging him with taking actions "aimed at overthrowing the people's administration" under article 79 of the Criminal Code. On 8 February 2013, the police of Phu Yen arrested Mr. Hào for the purpose of investigation.

30. Upon completion of the investigation, the police found that Mr. Hào was a member of the Republic of Viet Nam Government in Exile organization, tasked with preparing human resources and means for this organization to carry out its activities in Viet Nam aimed at overthrowing the Government by violence. Mr. Hào received funding from this organization to perform his assigned tasks, a total of USD 1,500 and 12 million dong by the time of his arrest.

31. The arrest, search and investigation relating to Mr. Hào were carried out following the issue of an arrest warrant, a search warrant and an investigation decision by the competent authority, approved by the competent People's Procuracies, which also supervised the enforcement of such warrants and decision to ensure that the process was in compliance with applicable laws and regulations.

32. On 11 September 2013, the People's Court of Phu Yen Province heard the case and sentenced Mr. Hào to 15 years' imprisonment and 5 years of probation under article 79 of the Criminal Code for the offence of taking actions "aimed at overthrowing the people's administration". On 23 December 2013, the Court of Appeal of the Supreme People's Court, based at Da Nang, heard the case and upheld the first instance sentence. Cooperation by Mr. Hào during the investigation phase, including providing further information and handing in relevant documents, was considered a mitigating factor by the Court when it decided on his sentence.

33. The first instance and appellate trials were public, and were carried out in accordance with applicable laws, including the Criminal Procedure Code. Mr. Hào's family was present at both trials. At the first instance trial, Mr. Hào refused to let his lawyer act as

[1] The urgent appeal was sent by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on the situation of human rights defenders, and the Special Rapporteur on the independence of judges and lawyers. Available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=19055.

[2] Available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=74605.

his defence counsel. However, due to the nature of the case and in compliance with the Law on the Organization of People's Courts, the trial panel decided to keep this lawyer as his counsel. At this trial, Mr. Hào pleaded guilty. He had a different defence counsel during the appellate trial.

34. Mr. Hào is currently being held at An Diem Detention Centre, Quang Nam Province. His rights under national legislation have been fully respected, including during his arrest, detention, trial and custody. The detention conditions and treatment of Mr. Hào comply with the national legislation on meals, clothing, accommodation, daily life and health care for inmates.[3] Doctors at the Detention Centre assessed the health of Mr. Hào. Mr. Hào was supplied with appropriate medicines and exempted from carrying out labour. His health is normal. He is allowed to read newspapers and watch television every day, to communicate with his family and to receive visits and supplies from them, as provided for by law.

35. The State of Viet Nam respects and implements all measures to ensure the rights of the people of Viet Nam to freedom of expression, freedom of the press and freedom of access to information. Article 25 of the 2013 Constitution stipulates that citizens have the rights to freedom of expression, of the press, of access to information, of assembly and of association, and the right to demonstrate. The exercise of these rights is to be prescribed by law. These provisions are further elaborated on in the Law on the Press, the Law on Publishing, the Law on Information Technology, the Law on Access to Information and the governmental decrees detailing a number of the provisions of those Laws.

Discussion

36. The Working Group thanks the source and the Government for their submissions. The Working Group appreciates the cooperation and engagement of both parties in the present matter.

37. In determining whether Mr. Hào's deprivation of liberty is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. The Government can meet this burden of proof by producing documentary evidence in support of its claims.[4] Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations (see A/HRC/19/57, para. 68).

38. In the present case, the Working Group finds that the source has established a credible prima facie case. The source has provided the original texts and translations of Mr. Hào's online articles, his petition to the President to assist victims of land disputes, the record of the search of his home on 20 December 2012, the judgment of the People's Court of Phú Yên Province at first instance, and the appeal judgment. These documents confirm many of the facts, dates and events leading up to Mr. Hào's arrest and detention and lend credibility to the source's case. The response of the Government also confirms the source's allegations in some respects. This includes the fact, agreed on by both parties, that Mr. Hào

[3] See the Law on Execution of Criminal Judgments of 2010, sect. 2 on the regimes regarding meals, clothing, accommodation, daily life and health care for inmates, decree No. 117/2011/ND-CP dated 15 December 2011 regulating the management of inmates and prison regimes regarding meals, clothing, accommodation, daily life and health care, and decree No. 90/2015/ND-CP dated 13 October 2015 amending and supplementing a number of provisions of decree No. 117/2011/ND-CP.

[4] See opinion No. 41/2013, in which it is noted that the source of a communication and the Government do not always have equal access to the evidence, and frequently the Government alone has the relevant information. In that case, the Working Group recalled that, where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he or she was entitled, the burden to prove the negative fact asserted by the applicant is on the public authority, because the latter is "generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law ... by producing documentary evidence of the actions that were carried out". *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at para. 55, p. 661.

was convicted under article 79 of the Criminal Code for taking actions "aimed at overthrowing the people's administration".

39. The source alleges that a warrant was not produced by the State party's authorities on two separate occasions prior to and during Mr. Hào's arrest. First, on 20 December 2012, the police and inspectors from the Department of Information and Communication searched Mr. Hào's home and computer without a search warrant. Notably, this search produced material that was used as evidence to convict Mr. Hào at his trial on 11 September 2013, and was relied upon by the Supreme People's Court in rejecting his appeal on 23 December 2013. Second, after having been invited to a police station in Tuy Hòa City for questioning, Mr. Hào was arrested on 8 February 2013 without an arrest warrant or other decision by a public authority. The Government could have challenged these allegations by presenting evidence showing the times and dates of issue of the warrants, but did not do so. Accordingly, the Working Group finds that Mr. Hào's home and computer were searched without a search warrant, and Mr. Hào was arrested without an arrest warrant.

40. The Working Group recalls that, according to article 9 (1) of the Covenant, no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law. Therefore, for deprivation of liberty to be considered lawful and not arbitrary, established legal procedures and guarantees must be respected. In the present case, evidence was obtained without following legal procedures. Moreover, Mr. Hào was arrested without being informed at that time of the reasons for his arrest, in violation of article 9 (2) of the Covenant. As the Working Group has stated, in order for a deprivation of liberty to have a legal basis, it is not sufficient for there to be a law authorizing the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant (see, for example, opinions No. 75/2017 and No. 46/2017).

41. The Working Group concludes that the Government has not taken the necessary steps to establish a legal basis for Mr. Hào's detention. Mr. Hào's deprivation of liberty is therefore arbitrary under category I.

42. The source alleges that Mr. Hào has been deprived of his liberty solely for exercising his rights under the Universal Declaration of Human Rights and the Covenant. In its response, the Government states that Mr. Hào was arrested and detained because he had planned and carried out activities with the aim of overthrowing the Government. As the Working Group has repeatedly stated in its jurisprudence, even when the detention of a person is carried out in conformity with national legislation, the Working Group must ensure that the detention is also consistent with the relevant provisions of international law (see, for example, opinions No. 79/2017, No. 75/2017, No. 42/2012, No. 46/2011 and No. 13/2007).

43. The Working Group notes that Mr. Hào was charged and convicted under article 79 of the Criminal Code, which provides that those who carry out activities, or establish or join organizations with the intention of overthrowing the people's administration are to be subject to the following penalties: (a) organizers, instigators and active participants, or those who cause serious consequences, are to be sentenced to 12–20 years' imprisonment, life imprisonment or capital punishment; (b) other accomplices are to be subject to 5–15 years' imprisonment.

44. The Working Group has considered the application of national security and public order provisions of the Criminal Code in Viet Nam on numerous occasions, including article 79 of the Criminal Code.[5] In those cases, the Working Group found that article 79 is so vague and overly broad that it could result in penalties being imposed on individuals who had merely exercised their rights under international law. The Working Group also

[5] See, e.g., opinions No. 35/2018, No. 40/2016, No. 26/2013, No. 27/2012 and No. 46/2011 in relation to article 79 of the Criminal Code. The Working Group understands that the Criminal Code was amended in November 2015, and that, despite some renumbering of provisions, the content of article 79 remains the same.

pointed out in those cases that the Government did not provide evidence of any violent action on the part of the petitioners, and that, in the absence of such information, the charges and convictions under article 79 could not be regarded as consistent with the Universal Declaration of Human Rights or the Covenant. The Working Group came to a similar conclusion in its report following a visit to Viet Nam in October 1994, noting that vague and imprecise national security offences did not distinguish between violent acts capable of threatening national security and the peaceful exercise of fundamental freedoms. It requested the Government to amend its laws in order to clearly define offences relating to national security and to state what was prohibited without any ambiguity (see E/CN.4/1995/31/Add.4, paras. 58–60 and 77).

45. In the present case, the Government did not submit any evidence to demonstrate that Mr. Hào's activities as a human rights defender and blogger were violent, or that he had incited others to commit acts of violence. Mere assertions that Mr. Hào had been involved in activities to overthrow the Government by violence are not sufficient, particularly when compared to the detailed case and information presented by the source. Indeed, as the source points out, in its judgments at first instance and on appeal, the People's Court acknowledged that Mr. Hào's activities were carried out in "non-violent form". Moreover, the Working Group considers that it is no coincidence that Mr. Hào's home was searched within three days of his posting a blog post that was particularly critical of the Communist regime. The Working Group recalls that the holding and expressing of opinions, including those which are critical of, or not in line with, official government policy, are protected under international human rights law. Mr. Hào's arrest and detention was clearly linked to the exercise of his rights under international law.

46. Accordingly, the Working Group considers that Mr. Hào's activities in blogging and calling for democratic reform fall within the boundaries of the freedom of expression protected by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant.[6] Similarly, the Working Group finds that, by associating with civil society and pro-democracy organizations in his efforts to bring democratic reform to Viet Nam, Mr. Hào was exercising his right to freedom of association under article 20 of the Universal Declaration of Human Rights and article 22 of the Covenant.[7] The Working Group is also of the view that Mr. Hào was engaging in advocacy relating directly to the political system in Viet Nam, and was deprived of his liberty as a result of exercising his right to take part in the conduct of public affairs under article 21 of the Universal Declaration of Human Rights and article 25 of the Covenant.[8]

47. The permitted restrictions on the freedoms of expression and association and on the right to take part in the conduct of public affairs under articles 19 (3), 22 (2) and 25 of the Covenant do not apply in the present case. The Government did not present any evidence to the Working Group to demonstrate how Mr. Hào's activities as a blogger and human rights defender were aimed at overthrowing the people's administration, nor why bringing charges under article 79 of the Criminal Code was a legitimate, necessary and proportionate response to his activities. In any event, in its resolution 12/16, the Human Rights Council calls on States to refrain from imposing restrictions that are not consistent with international human rights law, including restrictions on: discussion of government policies and political debate; reporting on human rights; peaceful demonstrations; and expression of opinion and

[6] The Working Group has found in several cases concerning Viet Nam that blogging and publishing material online fall within the right to freedom of expression under international law. See, e.g. opinions Nos. 75/2017, 27/2017, 26/2017, 33/2013, 26/2013, 27/2012, 1/2009, 13/2007, 19/2004, 20/2003 and 1/2003.

[7] The Working Group has also confirmed in cases relating to Viet Nam that the arrest and detention of individuals because of their association with pro-democracy groups is arbitrary. See, e.g., opinions No. 42/2012 and No. 6/2010.

[8] In paragraph 8 of its general comment No. 25 (1996) on participation in public affairs and the right to vote, the Human Rights Committee states that citizens may take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives, or through their capacity to organize themselves. See also opinions No. 40/2016, No. 26/2013, No. 42/2012, No. 46/2011 and No. 13/2007.

dissent. Moreover, in paragraph 23 of its general comment No. 34 (2011) on the freedoms of opinion and expression, the Human Rights Committee affirms that States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19.

48. In addition to the Working Group's findings, there is widespread concern in the international community about the use of national security legislation in Viet Nam to restrict the exercise of human rights, in particular the rights to freedom of expression and opinion. That concern is reflected in at least 34 of the recommendations contained in the 2014 report of the Working Group on the Universal Periodic Review of Viet Nam, several of which relate to the review and repeal of vague national security offences in the Criminal Code (including art. 79), the release of political prisoners and protection of human rights defenders, and the need for Viet Nam to implement the opinions of the Working Group on Arbitrary Detention.[9]

49. According to articles 1, 5 (c) and 8 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels, to communicate with non-governmental organizations, and to have effective access to participation in the conduct of public affairs.[10] The source's allegations demonstrate that Mr. Hào was detained for the exercise of his rights under the Declaration as a human rights defender. The Working Group has determined that detaining individuals on the basis of their activities as human rights defenders violates their right to equality before the law and equal protection of the law under article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant.[11]

50. The Working Group concludes that Mr. Hào's deprivation of liberty resulted from the exercise of his rights to freedom of expression and association, and to take part in the conduct of public affairs, and was contrary to article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant. His deprivation of liberty was therefore arbitrary and falls within category II. The Working Group refers this matter to the Special Rapporteurs on freedom of expression, and on the rights to freedom of peaceful assembly and of association.

51. As noted above, the Working Group considers that article 79 of the Criminal Code is so vague and overly broad that it could, as in the present case, result in penalties being imposed on individuals who had merely exercised their rights under international law. As the Working Group has previously stated, the principle of legality requires that laws be formulated with sufficient precision so that the individual can access and understand the law, and regulate his or her conduct accordingly.[12] In the present case, the application of vague and overly broad provisions adds weight to the Working Group's conclusion that Mr. Hào's deprivation of liberty falls within category II. Moreover, the Working Group considers that, in some circumstances, laws may be so vague and overly broad that it is impossible to invoke a legal basis justifying the deprivation of liberty.

[9] See A/HRC/26/6, paras. 143.4, 143.34, 143.115–118, 143.144–171 and 143.173.

[10] See also resolution 70/161, in which the General Assembly calls upon States to take concrete steps to prevent and put an end to the arbitrary arrest and detention of human rights defenders, and in this regard strongly urges the release of persons detained or imprisoned, in violation of the obligations and commitments of States under international human rights law, for exercising their human rights and fundamental freedoms.

[11] See, e.g., opinions No. 79/2017, No. 75/2017 and No. 26/2017.

[12] See, e.g., opinion No. 41/2017, paras. 98–101.

52. Given its finding that the deprivation of liberty of Mr. Hào was arbitrary under category II, the Working Group wishes to emphasize that no trial of Mr. Hào should have taken place. However, Mr. Hào was tried by the People's Court of Phú Yên Province on 11 September 2013, and the Working Group considers that his right to a fair trial was violated during that trial and during his appeal hearing on 23 December 2013.[13]

53. The source alleges that Mr. Hào's trial at first instance and his appeal hearing were not open to the public. In its response, the Government asserted that Mr. Hào's trial was open to the public, and that his wife and children were present along with other family members. However, the Government provided only a general denial of the source's allegations without further explanation or evidence, and the Working Group is convinced, on the basis of the credible case presented by the source, that the trial and appeal were not public. There is no evidence that any of the exceptions set out in article 14 (1) of the Covenant were used as grounds for barring the public from attending the trial and appeal hearings, or indeed that such exceptions were applicable in the present case. Mr. Hào did not receive a public hearing under article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant.

54. In the absence of an alternative explanation of the conduct of the trial court from the Government, the Working Group finds that Mr. Hào was not tried in an impartial manner. The Working Group makes this finding because Mr. Hào was denied the opportunity to address the court, to fully respond to questions, and to cross-examine and call witnesses, in accordance with the principle of equality of arms. This constitutes a violation of his right to an impartial tribunal under article 10 of the Universal Declaration of Human Rights and under article 14 (1) of the Covenant. This information also discloses a violation of Mr. Hào's right to call and examine witnesses under article 14 (3) (e) of the Covenant.

55. In addition, the trial judge took only 45 minutes to deliberate before convicting and sentencing Mr. Hào to 15 years' imprisonment, with a further 5 years of house arrest. A trial lasting only one day for a serious national security offence suggests that Mr. Hào's guilt had been determined prior to the hearing. Moreover, the source alleges, and the Government did not contest, that the courthouse was surrounded by police and that Mr. Hào was escorted into court by 30 uniformed police officers. As the Human Rights Committee states in paragraph 30 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, defendants should not be presented to the court in a manner indicating that they may be dangerous criminals, as this undermines the presumption of innocence.[14] Mr. Hào was denied the presumption of innocence guaranteed by article 11 of the Universal Declaration of Human Rights and article 14 (2) of the Covenant.

56. The source alleges that Mr. Hào made a confession after the police removed his clothes and continuously poured cold water onto his body. The trial and appeal transcripts provided by the source indicate that this confessional evidence was used against Mr. Hào. The Working Group recalls that, in line with paragraph 41 of Human Rights Committee general comment No. 32, the burden is on the Government to prove that statements made by Mr. Hào were given freely, and it has not done so in the present case. Mr. Hào's treatment violates article 14 (3) (g) of the Covenant. The Working Group refers this matter to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

57. The source alleges that Mr. Hào was denied his right under the Body of Principles to contact with the outside world. In its response, the Government asserted that Mr. Hào can

[13] The Working Group takes note of the source's argument that Mr. Hào's family was notified of the trial date only a week in advance and was thus unable to appoint a lawyer. According to the source, despite the appointment of a State defence lawyer, Mr. Hào opted to represent himself due to being prevented from appointing a lawyer of his choice. However, the Working Group is not convinced that this amounts to a violation of Mr. Hào's rights in the present case, given that Mr. Hào was in detention for seven months prior to trial and had sufficient time to brief a lawyer within that period in preparing for trial.

[14] See also opinions No. 79/2017, para. 62, and No. 40/2016, para. 41.

communicate with, and receive visits and supplies from, his relatives. However, it did not explain why it was necessary to impose restrictions on Mr. Hào's visitation rights. During Mr. Hào's pretrial detention and for the first 17 months of his post-trial detention, his family was only permitted to visit him on a monthly basis. Moreover, on 9 February 2015, Mr. Hào was transferred to a detention centre 300 km from his home. The Working Group finds that these limitations on Mr. Hào's contact with his family violated his right to have contact with the outside world under principles 15, 19 and 20 of the Body of Principles and rules 43 (3), 58 and 59 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). The Working Group considers that moving a 69-year-old man in poor health to a prison that is a substantial distance away from his home serves no purpose, other than imposing additional suffering on Mr. Hào and his family.

58. The Working Group concludes that these violations of the right to a fair trial are of such gravity as to give the deprivation of liberty of Mr. Hào an arbitrary character according to category III.

59. Furthermore, the Working Group considers that Mr. Hào was targeted because of his political or other opinion and due to his activities as a human rights defender. The source provided ample evidence of Mr. Hào's activities since 2008 defending the human rights of others and seeking democratic reform in Viet Nam through his blogs and other activities. The source also demonstrated a pattern of targeting Mr. Hào for his work, including the regular cautions he received from the police warning him against his activities as they were deemed to be "contrary to the interests of the State". Mr. Hào's disproportionately heavy sentence appears to have been imposed to send a message to human rights defenders that they must cease their work or face penalties. For these reasons, the Working Group finds that Mr. Hào was deprived of his liberty on discriminatory grounds, that is, due to his political or other opinion and due to his status as a human rights defender. His deprivation of liberty is arbitrary according to category V. The Working Group refers the present case to the Special Rapporteur on the situation of human rights defenders.

60. The Working Group wishes to express its grave concern about Mr. Hào's physical and mental health. The source reports, and the Government has not denied, that Mr. Hào has been subjected to ill-treatment during his detention and has already suffered a stroke. His physical and mental health have reportedly deteriorated rapidly due to a lack of access to proper medical treatment for his stomach ulcer, paralysis and hearing difficulties. In its response, the Government asserts that Mr. Hào is provided with adequate medicine, without providing any evidence. According to article 10 (1) of the Covenant and rules 1, 24 and 27 of the Nelson Mandela Rules, all persons deprived of their liberty must be treated with humanity and with respect for their inherent dignity, including enjoying the same standards of health care that are available in the community. The Working Group considers that there is no legitimate reason to continue to detain a 69-year-old man with significant health issues who has already served over five years of a lengthy sentence imposed contrary to his human rights, and to deprive him of the opportunity to live the remainder of his life with his family. The Working Group calls on the Government to immediately and unconditionally release Mr. Hào, and to ensure that he receives the necessary medical attention after his release.

61. The present case is one of several brought before the Working Group in recent years concerning the arbitrary deprivation of liberty of persons in Viet Nam.[15] The Working Group recalls that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law may constitute crimes against humanity.[16] The Working Group would welcome the opportunity to engage constructively with the Government to address issues such as the use of imprecise provisions of the Criminal Code to prosecute individuals for the peaceful exercise of their rights, which continues to result in the arbitrary deprivation of liberty in Viet Nam.

[15] See, e.g., opinions Nos. 35/2018, 79/2017, 75/2017, 27/2017, 26/2017, 40/2016, 46/2015, 45/2015, 33/2013, 26/2013, 42/2012, 27/2012, 46/2011, 24/2011, 6/2010 and 1/2009.

[16] See, e.g., opinion No. 47/2012, para. 22.

62. On 15 April 2015, the Working Group sent a request to the Government to undertake a country visit, as a follow-up to its earlier visit to Viet Nam in October 1994. In its response of 23 June 2015, the Government informed the Working Group that it planned to invite other special procedure mandate holders who had already requested to visit, but that it would consider issuing an invitation to the Working Group at an appropriate time. On 6 April 2017, the Working Group reiterated its request for a country visit, and awaits a positive response. Given that the human rights record of Viet Nam will be subject to review in January 2019 during the third cycle of the universal periodic review, an opportunity exists for the Government to enhance its cooperation with the special procedures of the Human Rights Council and to bring its laws into conformity with international human rights law.

Disposition

63. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Ngô Hào, being in contravention of articles 2, 7, 9, 10, 11 (1), 19, 20 and 21 (1) of the Universal Declaration of Human Rights and of articles 2 (1), 9, 14, 19, 22, 25 (a) and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

64. The Working Group requests the Government of Viet Nam to take the steps necessary to remedy the situation of Mr. Hào without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

65. The Working Group considers that, taking into account all the circumstances of the case, in particular the risk of harm to Mr. Hào's health, the appropriate remedy would be to release Mr. Hào immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

66. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Hào and to take appropriate measures against those responsible for the violation of his rights.

67. The Working Group requests the Government to bring its laws, including any equivalent of article 79 in the revised Criminal Code, into conformity with the recommendations made in the present opinion and with the commitments made by Viet Nam under international human rights law.

68. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteurs on freedom of expression, on freedom of peaceful assembly and of association, on human rights defenders, and on torture.

69. The Working Group encourages the Government to incorporate the Model Law for the Recognition and Protection of Human Rights Defenders into its domestic legislation and to ensure its implementation.[17]

Follow-up procedure

70. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Hào has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Hào;

(c) Whether an investigation has been conducted into the violation of Mr. Hào's rights and, if so, the outcome of the investigation;

[17] The Model Law was developed in consultation with more than 500 human rights defenders from around the world and 27 human rights experts. Available at www.ishr.ch/sites/default/files/documents/model_law_full_digital_updated_15june2016.pdf.

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Viet Nam with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

71. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

72. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

73. The Government should disseminate through all available means the present opinion among all stakeholders.

74. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[18]

[*Adopted on 26 April 2018*]

[18] See Human Rights Council Resolution 33/30, paras. 3 and 7.